COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *King v. Karpenko,*
2025 BCCA 357

Date: 20251017
Docket: CA48968

Between:

David Oliver King and John Doe

Appellants/
Respondents on Cross-Appeal
(Defendants)

And

Andriy Karpenko

Respondent/
Appellant on Cross-Appeal
(Plaintiff)

Before: The Honourable Justice Fisher
The Honourable Madam Justice Horsman
The Honourable Justice Mayer

On appeal from: An order of the Supreme Court of British Columbia, dated March 8, 2023 (*Karpenko v. King*, 2023 BCSC 345, Kelowna Docket M111424).

Counsel for the Appellants/ Respondents on Cross-Appeal:	R.C. Brun, K.C. J.J.L. Brun, K.C.
Counsel for the Respondent/ Appellant on Cross-Appeal:	B.E. Fitzpatrick
Place and Date of Hearing:	Vancouver, British Columbia May 20, 2025
Place and Date of Judgment:	Vancouver, British Columbia October 17, 2025

Written Reasons by:
The Honourable Justice Mayer

Concurred in by:
The Honourable Madam Justice Fisher
The Honourable Madam Justice Horsman

Summary:

The underlying action concerns a claim for damages arising from a motor vehicle accident. Liability was admitted at trial. The trial judge awarded Andriy Karpenko general damages, costs of future care, special damages and damages for both past and future loss of earning capacity.

In this appeal David King submits the judge erred in his assessment of past and future earning capacity. He contends the judge erred in determining that there was a real and substantial possibility, assessed at 20 percent, that if the accident had not occurred, Mr. Karpenko would have obtained a job as a police officer.

In the cross-appeal Mr. Karpenko submits the judge erred in his assessment of all heads of damages, excluding special damages.

Held: Appeal allowed in part; cross-appeal dismissed. The judge erred in finding a real and substantial possibility that Mr. Karpenko would have obtained a job as a police officer and considering this hypothetical possibility in his assessment of future loss of earning capacity. The judge's conclusion that Mr. Karpenko would have become a police officer was not consistent with his findings of fact or grounded in the evidence. This error impacted the judge's assessment of future loss of earning capacity. The judge made no errors in his assessment of general damages, cost of future care or past loss of earning capacity.

Reasons for Judgment of the Honourable Justice Mayer:

Overview

[1] On June 21, 2014, Andriy Karpenko's vehicle was rear-ended by the vehicle driven by David King. At the time, Mr. Karpenko was merging onto Highway 97 from Dilworth Drive in Kelowna (the "Accident").

[2] Mr. King admitted liability for the Accident and, after an 11-day damages-only trial in January 2023, the trial judge awarded Mr. Karpenko $100,000 in general damages, $37,000 in special damages, $100,000 for past loss of earning capacity, $300,000 for future loss of earning capacity, and $40,000 for cost of future care. The judge's reasons for judgement are indexed as *Karpenko v. King,* 2023 BCSC 345 (the "Trial Reasons").

[3] Mr. King appeals the judge's award for past and future loss of earning capacity. He submits the judge erred in law and made palpable and overriding errors in his findings of fact in his assessment of these damages.

[4] Mr. Karpenko cross-appeals the judge's awards for non-pecuniary damages, past and future loss of earning capacity, and cost of future care. He submits the judge made errors of fact, mixed fact and law, and law in his assessment of these damages.

[5] For the reasons set out below, I discern no error in the judge's assessment of non-pecuniary damages, damages for past loss of earning capacity, and cost of future care. However, it is my view the judge made a palpable and overriding error of fact in determining there was a real and substantial possibility that, absent the accident, Mr. Karpenko would have become a police officer. Although this error did not impact the judge's assessment of damages for past loss of earning capacity, it did impact his assessment of damages for future loss of earning capacity. I would reduce the award under this head from $300,000 to $164,500.

Background Facts

[6] Relevant background facts are set out at paras. 4–34 of the Trial Reasons. A summary of those facts is as follows.

[7] At the time of the Accident, Mr. Karpenko was in his early forties. He was formerly a high-ranking police and military officer in Ukraine. He immigrated to Canada under the skilled worker program in 2004 and began working as an auto mechanic. He first lived in Toronto and later in Winnipeg. In 2006, he moved to Penticton, British Columbia, and started working in the construction industry as an apprentice. In 2008, he formed his own construction company, completing commercial and residential renovation projects around the Kelowna area and gaining experience in masonry, framing, painting, insulation, drywall, and finishing.

[8] When Mr. Karpenko moved to Canada, it was his intention to become a police officer. He took steps in pursuit of this goal, including improving his English and taking courses to obtain qualifications as a security guard and security supervisor and working in those roles. In February 2011, Mr. Karpenko completed training through the Justice Institute of British Columbia and became an auxiliary member of the Kelowna RCMP, working one or two 12-hour volunteer shifts per week. He continued working in the construction industry, provided security at music festivals, and trained RCMP members in hand-to-hand combat. In 2011, he completed courses to become a bylaw enforcement officer.

[9] In the spring of 2011, Mr. Karpenko applied to become a police officer with the RCMP and municipal police departments, including those in New Westminster, Port Moody, Vancouver, and Saanich. He was interviewed by the Saanich Police and RCMP. During these interviews, Mr. Karpenko made it clear he was only interested in working with a police department if he was hired at a rank much higher than constable.

[10] Mr. Karpenko believed both the Saanich Police and RCMP were interested in hiring him because of his background in policing. He believed the RCMP wanted to recruit him and would fast-track him into service. He testified the RCMP suggested they would send him to Montreal to assist in policing the Russian mafia. Following his interviews, he continued to work in construction, as a security guard, and as an RCMP auxiliary officer. He also continued his usual active lifestyle by going to the gym, swimming, boxing, kickboxing, fishing, hunting, and playing recreational team sports.

[11] As stated earlier, the Accident occurred in Kelowna on June 24, 2014, when Mr. Karpenko's vehicle was hit from behind as he waited to merge onto the highway. At the time of impact, Mr. Karpenko's body and head were twisted to the left so he could see oncoming traffic. He felt immediate pain to his neck, back and head and felt dizzy. Shortly afterwards he began to experience numbness in the fingers in his left hand and numbness and sharp pains on the front and back of his left leg. As the day progressed, his pain symptoms increased.

[12] Afterwards, despite receiving passive therapies for his post-Accident symptoms, Mr. Karpenko continued to suffer from upper and lower back pain, left shoulder and neck pain, numbness in his left arm and leg, ongoing headaches, and difficulty sleeping. He moved more carefully due to fear of triggering increased pain.

[13] Mr. Karpenko took a break from construction work, finding even a small drywall job increased his pain. He took on construction jobs from 2014 through 2016 but found them difficult and relied heavily on sub-trades to complete the necessary work. He quoted on masonry jobs in 2014 and 2015 but ended up declining this work because he believed his ongoing symptoms would prevent him from completing them. He continued to work as an RCMP auxiliary officer until July 2014. He testified the required duty belt, vest, and physical duties resulted in

too much pain. He withdrew his applications to join the RCMP and Saanich Police because he believed he would not pass their physical examinations.

[14] In June 2016, Mr. Karpenko obtained a job with the City of Kelowna as a bylaw enforcement officer. He was initially hired as a traffic officer on a casual part-time basis under a six-month contract. His contract was renewed through November 2020.

The Judge's Findings of Fact Regarding Mr. Karpenko's Injuries

[15] The judge found Mr. Karpenko sustained soft tissue injuries in the Accident. He noted the medical evidence was not seriously in dispute and all doctors who testified at trial agreed Mr. Karpenko was suffering from a chronic pain condition related to his soft-tissue injuries: Trial Reasons at paras. 117–118.

[16] The judge accepted all the testimony of Dr. MacInnes, an expert in anesthesia and interventional pain management, including his diagnosis, prognosis, and opinion on causation of Mr. Karpenko's injuries: Trial Reasons at para. 119. A summary of the expert evidence of Dr. MacInnes, set out earlier in the Trial Reasons (at paras. 92–98), is as follows:

a) Mr. Karpenko was diagnosed with chronic whiplash-associated disorder, chronic mechanical spine pain, chronic myofascial pain syndrome, mood and anxiety symptoms, and sleep disruption;

b) the whiplash injury sustained by Mr. Karpenko in the Accident caused injuries to his neck, upper back, bilateral shoulder girdles, left arm, left hand, lower back, left buttock, left hip and left leg, all of which had become chronic;

c) the overall prognosis for any significant improvement of Mr. Karpenko's back pain and associated symptoms and myofascial pain syndrome and intermittent neurological symptoms in his left arm was guarded;

d) the prospect for a complete resolution of Mr. Karpenko's pain symptoms was poor; and

e) Mr. Karpenko did not meet the requirements for full-time work as a mason or construction worker now or in the future, was probably unable to meet the physical demands of being a police officer, and in the future,

> may need to reduce his work to part-time so he can manage his chronic pain.

[17] The judge concluded Mr. Karpenko was able to function relatively well despite his chronic pain. He also concluded that although Mr. Karpenko would continue to suffer from pain daily for the foreseeable future, it would not be to the level he suggested: Trial Reasons at paras. 121–122. He did not find chronic pain would affect Mr. Karpenko's ability to work as a bylaw officer or security guard: Trial Reasons at para. 170.

On Appeal

[18] The primary issue in Mr. King's appeal is whether the judge erred in assessing Mr. Karpenko's past and future loss of earning capacity by concluding that there was a real and substantial possibility, determined at 20 percent, that Mr. Karpenko would become a police officer.

[19] The issues in Mr. Karpenko's cross-appeal are whether the judge erred by significantly underestimating the likelihood he would have become a police officer in assessing damages for past and future loss of earning capacity, overlooking certain evidence and penalizing him for his stoicism in assessing non-pecuniary damages, and making an inordinately low award for costs of future care and providing insufficient reasons for not awarding costs for various care items.

Standard of Review

[20] The standard of review applicable in appeals of damages awards was succinctly set out by Justice Riley in *Lewis v. Gibeau,* 2025 BCCA 127:

> [41] The appeal court cannot intervene simply because it would have made a damages award different from the one made by the trial judge. An award of damages can be revisited on appeal only where: (i) there is no evidence to support the trial judge's conclusion, (ii) the trial judge erred in law or proceeded on a mistaken or wrong principle, or (iii) the award is "wholly erroneous", or so "inordinately" low or high that it must be "a wholly erroneous estimate of the damage": *Valley Traffic Systems Inc. v. Malak*, 2024 BCCA 370 at para. 48; *Reilly v. Lynn*, 2003 BCCA 49 at para. 99; *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435.
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> [42] With regard to a trial judge's underlying findings of fact, inferences drawn from those findings, and findings of mixed fact and law, the standard of review is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 19–23. On questions of law, including errors in principle or overall approach relating to assessment of damages, the standard of review is correctness: *Lo* at paras. 45–46.

[21] In my view, the grounds raised in both the appeal and cross-appeal involve arguments the judge made errors of mixed fact and law. Accordingly, the standard of review that applies is palpable and overriding error.

Discussion

Mr. King's Appeal

Did the judge err in concluding there was a real and substantial possibility that Mr. Karpenko would have become a police officer?

[22] Mr. King contends the judge relied primarily upon inadmissible hearsay from Mr. Karpenko in determining whether there was a substantial possibility that he would have become a police officer, and in any event, there was no evidence that supported this possibility on terms Mr. Karpenko would have accepted.

[23] In my view, the judge did not rely on hearsay evidence from Mr. Karpenko, but I agree with the appellant that the evidence does not support the conclusion of a substantial possibility.

[24] Mr. Karpenko testified about discussions he had with the RCMP and Saanich Police and suggested both forces were interested in hiring him. His evidence was not supported by the documentary evidence, which consisted of emails Mr. Karpenko received from the RCMP following up on an interview and from the Saanich Police advising of upcoming vacancies and asking if he was still interested in applying for an officer position. The Trial Reasons make it clear the judge did not admit Mr. Karpenko's evidence of his discussions with the RCMP and Saanich Police for the truth, but rather as evidence only of Mr. Karpenko's belief that he was a candidate.

[25] The judge noted that Mr. Karpenko "believed" both departments were interested in hiring him (Trial Reasons at paras. 12 and 14) but also that there was "no evidence from any police agency to support his contention that he would have secured any position in policing, much less one higher than entry-level" (Trial Reasons at para. 151). He did not rely on the emails Mr. Karpenko received as proof the RCMP or Saanich Police had offered him a job, noting the absence of any independent evidence about the job requirements or any "confirmatory evidence from a police force" (Trial Reasons at para. 120). More particularly, he noted there was no documentary evidence from the RCMP that supported Mr. Karpenko's position "that his acceptance into the RCMP was a *fait accompli"*

(Trial Reasons at para. 163) and rejected Mr. Karpenko's interpretation of the Saanich Police emails as being a job offer (Trial Reasons at para. 165).

[26] That said, I accept Mr. King's submission that the evidence does not support the judge's finding of a 20 percent chance Mr. Karpenko would have become a police officer. This includes, in his submission, the lack of documentary evidence or testimony from representatives of the RCMP or Saanich Police confirming that they wished to hire Mr. Karpenko. As well, Mr. King submits Mr. Karpenko's testimony—that he was unwilling to accept a police job in a remote location and expected to be hired into a more senior position—does not support this possibility.

[27] In respect of the claims for past and future loss of earning capacity, the hypothetical possibility at issue in this appeal is the possibility Mr. Karpenko would have become a police officer if the Accident had not occurred. As this Court has stated, "a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation": *Grewal v Naumann*, 2017 BCCA 158 at paras 46–48. The real and substantial possibility standard is lower than proof on a balance of probabilities: *Gao v Dietrich,* 2018 BCCA 372 at para. 34.

[28] In the Trial Reasons, the judge stated it was no more than a "significant possibility" or a "substantial possibility at best" that if the Accident had not occurred Mr. Karpenko would have become a police officer. It is not clear what the judge intended by these terms. He accepted that Mr. Karpenko had taken steps towards joining a police force between 2006 and 2012 and considered his background, experience and resume "in the best possible light". He also considered the lack of independent evidence from the RCMP or other police agencies about their job requirements and Mr. Karpenko being "fairly adamant" he would not accept an entry-level position (Trial Reasons at para. 120).

[29] Later in the Trial Reasons, the judge stated that Mr. Karpenko had proven a "substantial possibility that, but for the Collision, he would have become a police officer, but nothing further" (Trial Reasons at para. 151). Again, it is not clear what the judge meant by this, especially given the comments that followed:

> … Although I accept that policing was a career focus for the plaintiff, there is no evidence from any police agency to support his contention that he would have secured any position in policing, much less one higher than entry-level. [Mr. Karpenko] made it clear that he had no interest in being

> transferred to remote locations with the RCMP and no interest in joining any police force at the bottom rung. He was only interested in a higher-ranking position. There is no evidence whether, had he maintained that stance, any policing jobs would have been realistically available to him.

[30] The judge also expressed concern that Mr. Karpenko had made no reasonable efforts to pursue his goal of becoming a police officer in the two years before the Accident or to apply for a job in policing after the Accident. He was not satisfied that Mr. Karpenko's accident-related symptoms prevented him from "at least making further inquiries or applications" or that his chances of becoming a police officer would have occurred as early as January 2016 (Trial Reasons at paras. 152–154).

[31] Despite this, he went to find a 20 percent possibility of Mr. Karpenko becoming a police officer and calculated his loss of earnings based on this possibility as of January 2016 (Trial Reasons at paras. 154,157). It is not possible to reconcile the judge's underlying factual findings with his conclusion there was a real and substantial possibility Mr. Karpenko would have become a police officer by January 2016. In my view, this conclusion is untethered to the judge's underlying factual findings and the evidence and therefore speculative. As a result, I conclude that the judge erred when he found there was a real and substantial possibility Mr. Karpenko would have obtained a job as a police officer.

[32] I will next address if and how this error impacted the judge's assessment of damages under these heads.

Did the judge err in his assessment of past loss of earning capacity by considering loss of earnings as a police officer?

[33] Mr. King takes issue with the judge's conclusion that, if the Accident had not occurred, Mr. Karpenko would have earned on average, $15,000 more in gross annual earnings between the Accident and trial. In particular, he submits the judge erred by taking into consideration any possible loss of earnings as a police officer.

[34] Reading the Trial Reasons as a whole, I do not agree the judge considered potential loss of earnings as a police officer or otherwise erred in his assessment of Mr. Karpenko's damages for past loss of earning capacity. I will explain why.

[35] The judge's reasons concerning assessment of Mr. Karpenko's damages for past loss of earning capacity are as follows:

> [156] While I am prepared to accept that the plaintiff's Collision-related symptoms compromised his earnings in construction and masonry, and that he lost some income-earning ability as a consequence, I do not accept that loss was significant. Further, according to Ms. Clark's report, the average earnings of police officers in British Columbia from 2016 through 2020 is similar to the average earnings of bylaw officers in British Columbia in that timeframe.
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> [157] I conclude that the plaintiff's past loss of earnings claim should be assessed on the basis of him losing an average of $15,000 in gross annual earnings from the Collision to trial. In arriving at this amount, I have considered that there was a twenty percent chance that he would have become a police officer by January 1, 2016, but for the Collision, and that his income-earning potential as a contractor and mason was reduced as a result of his chronic pain symptoms. On that basis, I assess the plaintiff's past loss of earning opportunity related to the Collision net of income tax, at $100,000 (8 years x $15,000 = $120,000 less $20,000 income tax = $100,000).
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> [Emphasis added.]

[36] I note the judge's determination that "the average earnings of police officers in British Columbia from 2016 through 2020 is similar to the average earnings of bylaw officers in British Columbia in that timeframe" (emphasis added): Trial Reasons at para. 156. This suggests the judge concluded there was no difference in Mr. Karpenko's actual pre-trial earnings as a bylaw officer and his hypothetical earnings as a police officer during this period – and therefore did not include any amount for loss of earnings as a police officer in his analysis.

[37] In any case, the Trial Reasons demonstrate the judge attributed all of Mr. Karpenko's past loss to a reduced ability to work in construction. At para. 156, the judge stated he was "prepared to accept that the plaintiff's Collision-related symptoms compromised his earnings in construction and masonry, and that he lost some income-earning capacity as a result". As well, at para.157, the judge only referred to Mr. Karpenko sustaining a reduction in his income-earning potential as a contractor and mason due to his chronic pain symptoms.

[38] This is consistent with the position taken by Mr. King at trial. In closing submissions, Mr. King conceded Mr. Karpenko sustained an income loss resulting from a reduced capacity for construction work and agreed this loss was in the range of $5,000 to $15,000 per year before deduction for tax. He submitted it would be appropriate to assess past loss of earning capacity at the mid-point of this range, resulting in an award of $80,000 after tax. The judge apparently

accepted this range and chose the high end of that range. I see no error in doing so.

[39] In conclusion, in my view, the judge did not consider potential loss of income as a police officer in his assessment of Mr. Karpenko's damages for past loss of earning capacity. He only considered loss resulting from Mr. Karpenko's reduced capacity to perform construction work. There was no dispute at trial that Mr. Karpenko sustained such a loss of capacity as a result of the Accident. The judge had evidence before him concerning Mr. Karpenko's pre- and post-Accident earnings from construction and the submissions of counsel setting the upper range of gross annual loss at $15,000 – which he was entitled to consider in his assessment of damages. No error has been identified, and it cannot be said the judge's award was inordinately low or high.

[40] As a result, I would not accede to this ground of appeal.

Did the judge err in his assessment of future loss of earning capacity?

[41] Mr. King submits the judge's award of $300,000 was "plucked out of the air". He proposes, assuming Mr. Karpenko sustained a loss of capacity to perform construction work resulting from his chronic pain, an award based on annual income loss of $10,000 per year to age 65 would be reasonable. He submits the present value of his losses to that age, totaling $109,660, would be a fair award.

[42] Again, I agree with Mr. King that the judge erred in determining there was a real and substantial possibility that but for the Accident Mr. Karpenko would have become a police officer. As a result, he erred by considering this hypothetical possibility in his assessment of future loss of earning capacity.

[43] The judge started his analysis at para. 158 of the Trial Reasons by referring to the reasons of this Court in *Dornan v. Silva,* 2021 BCCA 228 at para. 156. In *Dornan*, this Court set out that an award for future loss of earning capacity requires an assessment of and comparison between a plaintiff's likely future with- and without-accident earnings. The judge also referred to the reasons of this Court in *Rab v. Prescott,* 2021 BCCA 345 at para. 28, stating at para. 158 of the Trial Reasons that because such an assessment deals with the "unknown future", it involves the consideration of hypothetical events.

[44] The judge then set out the three-step process to be used in analyzing this claim:

> [159] It is a three-step process: (i) whether the evidence discloses a potential future event that could lead to a loss of capacity; (ii) whether the evidence discloses a real and substantial possibility of a future loss of earnings; and if so, (iii) an assessment of the value of that possible future loss, which includes an assessment of the relative likelihood of that possibility occurring: *Rab* at para. 47. Once the assessment has been made, the court must then determine if the proposed damages award is fair and reasonable: *Lo v. Vos*, 2021 BCCA 421 at para. 117.

[45] At paras. 162–166 of the Trial Reasons, the judge again summarized evidence concerning the likelihood of Mr. Karpenko becoming a police officer if the Accident had not occurred. At para. 167, he concluded: “all things considered, and similar to my conclusion respecting the plaintiff’s past loss of earnings claim, I assess his chances of securing a position as a police officer at twenty percent”.

[46] The judge then found, with respect to the first two steps in the analytical process described in *Rab,* Mr. Karpenko suffers from ongoing non-debilitating chronic pain that will detrimentally impact his ability to work in construction and masonry, and, as a consequence, there is a real and substantial possibility he will suffer a loss of earnings in the future—especially in relation to his construction and masonry work. The judge was not persuaded Mr. Karpenko’s symptoms would affect his ability to work as a security guard or bylaw officer: Trial Reasons at paras. 168–170.

[47] The judge then moved on to the third step in *Rab*, assessment of the value of a possible future loss. At para. 172 of the Trial Reasons, the judge summarized the opinion evidence of Christiane Clark, an expert economist retained by Mr. Karpenko, estimating the difference between Mr. Karpenko’s with- and without-Accident future earnings to be $1,613,060. This estimate, based on average earnings statistics, compared his potential earnings to age 65, working full-time as a police officer and in construction on his days off, to the average full-time earnings of construction workers.

[48] The judge then decided “[g]iven the lack of certainty that the plaintiff would ever have become a police officer”, the correct approach to assessing his damages for future loss of earning capacity would be to apply the capital asset approach: Trial Reasons at para. 174. No issue is taken in this appeal with the judge’s decision to apply this approach.

[49] Despite deciding to assess Mr. Karpenko's damages in this way, the judge set out calculations under both the earnings and capital asset approaches:

> [176] I consider the possibility that the plaintiff would have become a police officer to be low, in the range of twenty percent. If that event did occur, I am not persuaded that he would have carried on a career in construction and masonry other than on a very part-time basis. Taking Ms. Clark's figure as a guide and discounting it by eighty percent to account for my assessment of the relative likelihood of her assumptions occurring, the earnings approach translates into a loss of $322,612.
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> [177] Ms. Clark also provided the present-value multipliers for the plaintiff's future loss of earnings, assuming a loss of $1,000 per year to various ages in the future. For example, if his Collision-related injuries result in him losing an average of $10,000 per year to age 65, the present value of that loss would be $109,660. If that loss continued to age 70, the present value of that loss would be $145,550. If his average annual loss was $20,000, the present value of the future losses would be $219,320 to age 65 and $291,000 to age 70.

[50] At para. 178 of the Trial Reasons, the judge assessed Mr. Karpenko's damages for future loss of earning capacity to be $300,000, which he confirmed he assessed using the capital asset approach. Although the judge did not explain whether he relied on the calculation set out at para. 176 or 177, it can be assumed he relied upon the latter, given his confirmation that he applied a capital asset approach. On this assumption, it is possible the judge completed this assessment on the basis that Mr. Karpenko would sustain a loss of income of $20,000 per year from the date of trial to age 70 and then rounded up the resulting $291,000 present value of his earning capacity loss over that period to $300,000.

[51] Unfortunately, the judge did not explain, nor can it be gleaned from the record, how he came to apply $20,000 as an estimate of annual income loss in completing this assessment. In addition, he did not make any finding regarding when Mr. Karpenko was likely to retire. Despite this lack of clarity, reading the Trial Reasons as a whole, it is apparent the judge took Mr. Karpenko's hypothetical earnings as a police officer into consideration in assessing future loss of earning capacity.

[52] As set out earlier in the discussion regarding past loss of earning capacity, a hypothetical possibility should only be taken into consideration as long as it is a real and substantial possibility and not mere speculation. I also note the comments of this Court in *McHatten v. Insurance Corporation of British Columbia,* 2023 BCCA 271:

> [19] As has oft been noted, assessing loss of future earning capacity is a particularly difficult exercise for a trial judge. The central task involves comparing the plaintiff's likely future working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133. That comparison must be grounded in the evidence before the judge, as limited as it may be.

[53] In this case, the judge's assessment of Mr. Karpenko's with and without-Accident working life relied in part upon a faulty premise; that is, there was a real and substantial possibility that if the Accident had not occurred, Mr. Karpenko would have become a police officer. For the reasons I have stated, this premise was not grounded in the evidence and it was inconsistent with the judge's factual findings. It is not possible to discern from the judge's reasons how much of the $20,000 average annual future income loss award arose from a loss of capacity to work in construction or from policing. As a result, his assessment of damages for future loss earning capacity must be set aside.

[54] Given this conclusion, it is not necessary to address Mr. King's submission that the judge also erred by failing to consider Mr. Karpenko's residual earning capacity as a bylaw officer.

What remedy should flow from the judge's error in assessing future loss of earning capacity?

[55] As stated earlier, Mr. King seeks an order from this Court reassessing Mr. Karpenko's damages for loss of future earning capacity. The other option is for this Court to remit assessment of these damages back to the Supreme Court.

[56] In deciding whether to remit this back to the court below, the key question is whether it is "possible to substitute a proper award that is consistent with the evidence and the findings of fact": *Dornan* at para. 163, citing *Schenker v. Scott*, 2014 BCCA 203 at para. 83. In this case, I would conclude such a substitution is possible and in the interests of justice.

[57] The following findings of the judge are available and relevant to an assessment of Mr. Karpenko's future loss of earning capacity:

a) Mr. Karpenko's ability to work in construction, masonry and security—particularly engaging in heavier work—will be detrimentally affected to

some extent, and this will lead to some indeterminate loss of earnings in the future (Trial Reasons at paras. 168–169); and

b) Mr. Karpenko's chronic pain will not affect his ability to work as a security guard or bylaw officer (Trial Reasons at para. 170).

[58] In summary, given my conclusion earlier, the only hypothetical possibility proven at trial is Mr. Karpenko has sustained a future loss of capacity to perform construction work (which includes masonry).

[59] In *Pallos v. Insurance Corp. of British Columbia*, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.), this Court identified three acceptable methods of assessing damages using the capital asset approach:

> [43] The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of year remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so. …
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> [Emphasis added.]

[60] In my view, for the purpose of assessing future loss of earning capacity, it is appropriate to apply the average gross annual income loss amount the judge used in his assessment of past loss of earning capacity—that is, an annual loss of $15,000 in construction work earnings. This reflects the real and substantial possibility proven at trial, namely Mr. Karpenko will sustain a future loss of earnings from a reduced capacity to perform construction work. Also, as stated earlier, a $15,000 annual loss of potential earnings from this work is within the range proposed by counsel for Mr. King—albeit at the high end.

[61] As noted earlier, the judge did not make any finding regarding when Mr. Karpenko would likely have retired from work in construction. During closing submissions at trial, his counsel submitted, "Mr. Karpenko likely would have – he wouldn't have chosen to retire early, he would have worked to 65". I consider it reasonable to assume that, absent the Accident, he would have retired from work in construction by this age.

[62] Mr. Karpenko was 52 at the time of trial. Accordingly, based on retirement at age 65, gross annual income loss of $15,000, and applying the multiplier utilized by Ms. Clark, the present value of his construction-related income loss is $164,490. I would substitute this amount, rounded up to $164,500, as the award for future loss of earning capacity, in place of the judge's award of $300,000.

Mr. Karpenko's Cross-Appeal

[63] In his cross-appeal, Mr. Karpenko contends the judge erred in his assessment of damages for past and future loss of earning capacity, non-pecuniary damages, and costs of future care. I will deal briefly with these grounds of appeal.

Did the judge err by applying a standard closer to absolute certainty in determining the likelihood of Mr. Karpenko becoming a police officer?

[64] Mr. Karpenko raises several arguments with respect to the judge's assessment of both past and future loss of earning capacity. His primary argument is that the judge erred by requiring a degree of certainty, approaching absolute certainty, in his analysis of the likelihood of his becoming a police officer and he seeks an order substituting this likelihood at 60 percent in place of the judge's 20 percent.

[65] It is not necessary to address this argument as my conclusion that the judge erred in finding a real and substantial possibility of this occurrence is dispositive of this ground of appeal.

Did the judge make any errors in his assessment of non-pecuniary damages?

[66] Mr. Karpenko submits the judge made palpable and overriding errors of fact, including by misapprehending his stoicism as an ability to continue his activities post-Accident unchanged.

[67] The judge found that, despite his chronic pain condition, Mr. Karpenko had been able to function relatively well, but there was no doubt his chronic symptoms have and will continue to affect his function to varying levels: Trial Reasons at paras. 121–122.

[68] After referring to the factors that influence an award of non-pecuniary damages, as set out by this Court in *Stapley v. Hejslet,* 2006 BCCA 34 at para. 46,

the trial judge made further findings relevant to these factors. With respect to how Mr. Karpenko would be impacted by his symptoms, the judge found as follows: Mr. Karpenko's symptoms interfered with his work, recreation and home life, and he would have to manage chronic pain (Trial Reasons at paras. 124, 133); although Mr. Karpenko's pre-Accident recreational activities were curtailed to some degree, he continued to participate in them "mostly unchanged" (Trial Reasons at para. 135); and Mr. Karpenko continued to be able to function and perform most pre-Accident activities while contending with varying degrees of pain and discomfort (Trial Reasons at para. 136).

[69] At para. 129 of the Trial Reasons, the judge noted Mr. Karpenko's reliance on authorities including *Stapley, Bhatti v. Jones,* 2020 BCSC 1935, and *Gill v. Apeldoorn,* 2019 BCSC 798, in support of his submission $200,000 should be awarded. In those cases, non-pecuniary damages of between $175,000 and $200,000 were awarded.

[70] At para. 130 of the Trial Reasons, the judge noted the authorities Mr. King relied upon in support of his submission that non-pecuniary damages of between $70,000 and $90,000 should be awarded, including *Hoffman v. Luan,* 2021 BCSC 811, *Dosangh v. Xie,* 2017 BCSC 1937, and *Khademolhosseini v. Ji,* 2019 BCSC 854.

[71] The judge determined the circumstances in the authorities Mr. King referred to were more analogous to the circumstances of Mr. Karpenko and assessed his non-pecuniary damages to be $100,000: Trial Reasons at paras. 131, 137.

[72] It is apparent the judge was aware, given his reference to para. 46 of *Stapley,* a plaintiff's stoicism is not a factor which, generally speaking, should penalize the plaintiff. The judge's analysis at paras. 133–136 of the Trial Reasons establishes he appropriately considered other *Stapley* factors, including Mr. Karpenko's age, the nature of his injuries, the severity and duration of his pain symptoms, and the impact his symptoms had on him.

[73] Mr. Karpenko does not argue there was no evidence to support the trial judge's assessment of non-pecuniary damages. In my view, he has not identified a palpable and overriding error of fact or established the judge erred in law or proceeded on a mistaken or wrong principle or the award he made was so

inordinately low or high that it constitutes a wholly erroneous estimate of damage. I see no basis to disturb it.

Did the judge err in his assessment of cost of future care?

[74] At trial, Mr. Karpenko sought a “ball park” award for cost of future care in the range of $245,000: Trial Reasons at para. 181. It is unclear on the record how this amount was calculated. Mr. Karpenko has not provided an explanation in his submissions on appeal, nor can this be gleaned from the record.

[75] In his cross-appeal, Mr. Karpenko submits the judge erred by awarding $40,000 for cost of future care. He submits this award is inordinately low in light of the award of $37,000 for special damages. In addition, he submits the judge failed to consider how his continued functioning was related to his requirements for continuing treatment and failed to provide sufficient reasons regarding how he arrived at the $40,000 award.

[76] Mr. King submits the judge considered the available evidence. This includes the table setting out cost estimates for various care modalities prepared by Ms. Bos – an occupational therapist who prepared a report on Mr. Karpenko’s functional capacity and cost of future care. He further submits the judge correctly determined the amount of reasonable care Mr. Karpenko required, and the reasonable period of time over which such care would be provided.

[77] Damages for the cost of future care must be medically justified and reasonable. A reasonable award is one that is moderate, fair to both parties, and provides what is reasonably necessary to preserve the plaintiff’s health: *Warick v. Diwell,* 2018 BCCA 53 at para. 24.

[78] Awards for the cost of future care may only be interfered with where the trial judge applied a wrong principle of law, made a palpable and overriding error, or made an award so inordinately high or low it results in a wholly erroneous estimate of damage: *Peters v. Taylor*, 2023 BCCA 391 at para. 5.

[79] I would not accede to Mr. Karpenko’s submissions.

[80] An award of special damages being higher than an award for the cost of future care does not intrinsically reflect an error. A special damages award compensates a plaintiff for the cost of care received to trial. A cost of future care

award may be higher and lower depending on what award is reasonably necessary to preserve a plaintiff's health.

[81] Mr. Karpenko has not identified any basis in the Trial Reasons to support his assertion the judge failed to consider how his continued functioning is related to continued treatment. To the contrary, the judge was clearly aware of, and engaged with, the submissions and expert evidence addressing this. For example, the judge specifically referred to Ms. Bos' recommendation that Mr. Karpenko receive certain passive therapies and medications for life and Dr. Etheridge's recommendation that he receive passive therapies in the "long term" (Trial Reasons at paras. 183,184). The judge accepted Mr. Karpenko's symptoms would wax and wane and he would have good and bad days (Trial Reasons at para. 190).

[82] I am not satisfied the judge failed to provide adequate reasons for this award justifying appellate intervention. After reviewing the expert medical evidence concerning Mr. Karpenko's future care requirements in some detail, including setting out the duration treatment would be required, the judge set out the following conclusions:

> [189] I conclude that some of these recommendations are reasonable and medically justified. The plaintiff would benefit from an active rehabilitation program with supervision. He will also benefit from physiotherapy, massage therapy and chiropractic adjustments as needed to relieve increased symptoms and flare-ups that he will experience. He should be given access to those modalities. The plaintiff should also be given prescribed exercises for him to do on his own with a periodical return to the kinesiologist for updates. He should be provided with a yearly pass to a recreational centre or gym, psychological counselling for chronic pain management, and pain medications on an ongoing basis. This will allow the plaintiff to stay as functional as possible.
>
> [190] I accept that the plaintiff's pain-limited tolerance to work and perform everyday activities will depend on the severity of his symptoms each day. I accept that his symptoms will wax and wane. Some days will be good days, and some days will be bad days. I conclude that the plaintiff can function relatively well during the good days, but he will have difficulty functioning when the pain is aggravated. It is not that he cannot work as a mason or in construction at all, but rather that by doing so he risks an increase in his pain symptoms.

[83] After stating his conclusions, the trial judge then estimated a reasonable amount to compensate for Mr. Karpenko's anticipated future care costs, relying on Ms. Bos' costing. Mr. Karpenko does not identify an error of fact or law in the judge's analysis.

[84] Mr. Karpenko bears the burden of showing the award is so inordinately low as to be wholly erroneous. He has not set out what award he submits should have been made but simply asks this Court to make the assessment on the basis of the record. Having reviewed the judge's summary of the medical evidence concerning Mr. Karpenko's future care needs and the report of Ms. Bos, setting out her estimate of the cost of various treatments, I am not persuaded that the judge's award of $40,000 is inordinately low.

[85] In conclusion, Mr. Karpenko has not identified an error of law or palpable and overriding error with respect to this award. The Trial Reasons demonstrate the judge carefully considered and weighed the evidence before him, and I would not disturb his conclusion.

Disposition

[86] I would allow the appeal of Mr. King to the extent of setting aside the award of $300,000 for future loss of earning capacity and substituting an award of $164,500.

[87] I would dismiss the cross-appeal.

"The Honourable Justice Mayer"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Madam Justice Horsman"